No. 87-1167

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

PRICE WATERHOUSE,
Petitioner,
v.
ANN B. HOPKINS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN THE SUPPORT OF THE PETITIONER

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The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus curiae in support of the Petitioner. The written consents of all parties have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide association of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community. Its gov-

erning body is a Board of Directors composed of experts and specialists in equal employment opportunity. Their combined experience gives the Council an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment opportunity programs and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members, and the constituents of its trade association members, are employers subject to Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.*, and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, as well as other equal employment statutes and regulations. As employers, and as potential respondents to charges of discrimination pursuant to Title VII and the ADEA, EEAC's members have a strong interest in the issues presented here.

In this case, the district court found that there were legitimate, nondiscriminatory and nonpretextual reasons for the employment decision, and also that there was no showing by the plaintiff that assertedly sexually stereotypical statements played a *causal* role in the plaintiff's failure to be made a partner. The court of appeals, however, shifted the burden to the employer to prove by "clear and convincing" evidence that the unlawful factor was not the determinative one. This burden of proof is out of step with previous decisions of this Court holding that the burden of proof remains at all times with the plaintiff in a disparate treatment case. In addition, the use of the "clear and convincing" standard below was erroneous and contrary to previous decisions of this Court using the "preponderance of the evidence" standard.

Affirmance of the standards applied below would improperly shift the burden in Title VII, ADEA and other employment-related actions.

Because of its interest in the application of the nation's civil rights laws, EEAC has filed over 230 briefs as amicus curiae in cases before the United States Supreme Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this amicus activity, EEAC has participated in several cases involving the burden of proof in discrimination cases, including *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Connecticut v. Teal*, 457 U.S. 440 (1982) and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

STATEMENT OF THE CASE

The plaintiff in this case was a senior manager who was informed that she would not be selected as a partner by Price Waterhouse. The decision not to select plaintiff as a partner came at the end of a comprehensive process. Price Waterhouse is one of the "big eight" accounting firms. When the trial began in this case, it had 662 partners working in 90 offices around the country. (Pet. App. 3a).[1] Potential partners are nominated by a local office. The names and accompanying performance appraisals of all nominees are circulated to all partners, who are invited to comment on candidates. (Pet. App. 5a).

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[1] "Pet. App." references are to the appendix to the petition for certiorari.

Long or short form evaluations are filled out, depending on the degree of knowledge of the candidate. All nominees are ranked against other recent partnership candidates in 48 categories. (Pet. App. 41a).

Recommendations for partnership are made to the Policy Board by its Admissions Committee. The Board then votes on which candidates are to be included on the partnership ballot. A partnership-wide election then is held. Those not placed on the ballot are informed of the Board's reasons for rejecting or postponing their candidacies. (Pet. App. 5a).

The district court below found that:

> Because the plaintiff had considerable problems dealing with staff and peers, the Court cannot say that she would have been elected to partnership if the Policy Board's decision had not been tainted by sexually biased evaluations. Even supporters of the plaintiff viewed her style as somewhat offensive and detrimental to her effectiveness as a manager.

(Pet. App. 59a). One fourth of the thirty-two partners who evaluated the plaintiff opposed her admission. (Pet. App. 6a). Three others recommended that she be held for reconsideration; and eight said they had insufficient information to form an opinion. (*Id.*).

The district court found that "[m]any of the comments from evaluating partners centered on Hopkins' apparent difficulties with staff, and both supporters and opponents of her candidacy characterized her as sometimes overly aggressive, unduly harsh, impatient with staff and very demanding." (*Id.*). Indeed, plaintiff had been counseled about these shortcomings and indicated "that she agreed with many of these criticisms." (Pet. App. 46a).

On the other hand, the district court stated that Hopkins was "qualified for partnership consideration", as she was "exceptionally successful in garnering business for the firm." (Pet. App. 4a). In addition, there were a number of negative comments that the courts below found were sex-related. For example, statements were made suggesting she needed a course in "charm school", that she may "have overcompensated for being a woman", or that she used profanity. (Pet. App. 6a). Other examples of allegedly discriminatory statements are set out in the decisions below.

In evaluating plaintiff's arguments that the decision to deny her partnership was discriminatory, the district court held: "that the complaints about the plaintiff's interpersonal skills were not fabricated as a pretext for discrmination" (Pet. App. 46a-48a); and that "Price Waterhouse had legitimate, nondiscriminatory reasons for distinguishing between the plaintiff and the male partners with whom she compares herself" (Pet. App. at 48a). Nevertheless, the district court found that sex-related comments were made about plaintiff, relying on the testimony of an "expert" in stereotyping who "did not purport to be able to determine whether or not *any particular reaction* was determined by the operation of sex stereotypes." (Pet. App. 53a) (emphasis added).

The Court then found:

> [W]hile stereotyping played an undefined role in blocking plaintiff's admission to the partnership in this instance, it was unconscious on the part of

> the partners who submitted comments. *The comments of the individual partners and the expert evidence of Dr. Fiske do not prove an intentional discriminatory motive or purpose.*

(Pet. App. 54a) (emphasis added).

But the district court also stated that although this stereotyping may have been unconscious, Price Waterhouse maintained a system that gave weight to such criticism. Thus, the court held that the plaintiff was the victim of "omissive and subtle" discrimination. (Pet. App. 56a). Stating that there was a "mixture of legitimate and discriminatory considerations," the court held that the plaintiff was entitled to relief "unless the employer has demonstrated by clear and convincing evidence that the decision would have been the same absent discrimination." Pet. App. 59a.

The "clear and convincing" burden placed on the employer by the district court was affirmed by the court of appeals. The court of appeals noted that the "courts have struggled to resolve the difficult questions of causation that arise in mixed-motive cases such as this." (Pet. App. 22a).[2] It then reviewed the confusion in the court of appeals decisions. (Pet. App. 20a-24a).[3] It held that when the plaintiff

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[2] In its brief to this Court, Price Waterhouse properly disputes the characterizations of the courts below that this is a "mixed motive" case, as did Judge Williams' dissent, discussed below. The Amicus strongly concurs with those arguments.

[3] Indeed, as the petition for a writ of certiorari in this case shows, "the courts of appeals have devised no fewer than five inconsistent ways to resolve cases in which it is argued that the defendant acted on the basis of both a lawful and an unlawful motive." Cert. Pet. 13.

has shown that impermissible bias was a part of the employment decision:

> "We chose . . . to place the burden upon the employer to show, by 'clear and convincing evidence,' that the unlawful factor was *not* the determinative one."

Pet. App. 23a, citing *Toney v. Block*, 705 F.2d 1364, 1366 (D.C. Cir. 1983) (emphasis in original). It is this ruling that is addressed by this brief.

In dissent, Judge Williams criticized the majority's reliance on assertedly stereotypical language in order to find a violation, stating that this "evidence of sexual stereotyping is carefully culled from a mass of critical comments on the plaintiff's abrasiveness with no sex link whatever." Pet. App. 29a. The dissent stated that these negative comments about plaintiff's partnership qualifications were well founded in fact, represented standards applied to men and women alike, and were the true basis of the firm's decision. Pet. App. at 29a-30a. Applying the standards of *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), Judge Williams criticized the majority for improperly putting upon the defendant the burden of proving that its reasons were not pretextual. Pet. App. 30a.

Further, in vivid contrast to the majority's reliance upon an "expert" in sex stereotyping who was not familiar with the specific facts of this case, Judge Williams examined in detail the effect this alleged stereotyping played in the partnership decision and determined that the record did not support the majority's conclusions. Pet. App. 31a-38a.

Judge Williams also criticized the majority for calling this a "mixed motive" case as " 'discrimination has *not* been specifically attributed to the employment decision of which the plaintiff complains' ", Pet. App. 38a, *citing Toney v. Block*, 705 F.2d 1364, 1366 (D.C. Cir. 1983). Since there was not enough evidence to support a verdict for the plaintiff "under any established approach to Title VII liability," Judge Williams would not have found a violation. Pet. App. 38a-39a.

SUMMARY OF ARGUMENT

The decisions below improperly shifted the burden to the employer to prove by "clear and convincing" evidence that the unlawful factor was not the determinative factor in plaintiff's failure to attain partnership. Under Title VII's language, the plaintiff must prove that she was adversely affected "because of" her sex—a finding which the district court specifically found could not be made in this case. As the courts have recognized, employment decisions are complex, and an undeserving plaintiff should not prevail merely because the record may reveal an instance of illegal motivation which the plaintiff cannot prove had a causal connection to the denial of a job opportunity.

Thus, this Court has developed a "sensible, orderly" method of allocating the burden of proof. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). Even if the plaintiff can demonstrate that an illegal motive may be present, the employer can rebut this evidence with evidence that its decision was based upon legitimate considerations. At this point, the initial *prima facie* presumption "drops

from the case," the district court is to examine all the facts developed at trial, and the "plaintiff retains the burden of . . . persuading the court that a discriminatory reason *more likely* motivated the employer . . ." *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) (quoting *Burdine*, 450 U.S. at 248) (emphasis added).

There are sound, practical reasons for allocating the proof in this manner. Often it can be shown that the person who made a discriminatory statement was not involved to a sufficient degree in the employment decision. *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1412-13 (7th Cir. 1984). In other cases, the individual will lack the qualifications, or cannot show that there was an opening available for the position sought. Other times, as in the instant case, the employer's statements cannot be shown to be pretextual, or the plaintiff cannot establish a causal connection between the alleged discrimination and the employer's conduct.

This Court's decisions in *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 287 (1977), and *National Labor Relations Board v. Transportation Management Corp.*, 462 U.S. 393 (1983) do not require a different result. Neither was a Title VII case nor involved a statutory scheme which bars relief unless the plaintiff can show that a employment benefit was denied "because of" discrimination. Also, *Transportation Management* was based upon the fact that the NLRB viewed the employer's burden as establishing an "affirmative defense" (462 U.S. at 402-03), a standard never used in allocating Title VII's evidentiary burdens. Finally, in any event, inasmuch as both *Mt. Healthy* and *Transportation Manage-*

ment used the "preponderance of the evidence" standard, the unexplained use of the "clear and convincing" standard below cannot stand.

ARGUMENT

TO PREVAIL IN A TITLE VII "MIXED MOTIVE" CASE, THE PLAINTIFF MUST DEMONSTRATE THAT THE DISCRIMINATORY MOTIVATION WAS THE DETERMINING ("BUT FOR") FACTOR IN THE CHALLENGED EMPLOYMENT DECISION.

I. The Language Of Title VII Requires That To Establish Illegal Discrimination And To Receive Any Relief, The Plaintiff Must Prove The Employer's Action Was Taken "Because Of" The Plaintiff's Sex, Race Or Other Protected Characteristic.

By placing the burden on the employer to prove by "clear and convincing" evidence that the unlawful factor was not the determinative factor in an employment decision, the courts below improperly shifted the Title VII burden of proof onto the employer and ignored established precedent rejecting the clear and convincing standard.

In order to prevail in a Title VII case, the plaintiff must prove that the employment decision was caused by illegal discrimination. Section 703(a) of Title VII prohibits discrimination against an individual "because of" that person's race, color, religion, sex or national origin.[4] *See McQuillen v. Wisconsin*

[4] The full text of Section 703(a), 42 U.S.C. Sec. 2000-e-2(a) (1982) states as follows:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's race, color, religion, sex, or national origin.
>
> (Emphasis added.)

Education Association Council, 830 F.2d 659, 664 (7th Cir. 1987). Additionally, proof of causation is required by Title VII's remedial provision. Section 706(g), 42 U.S.C. Sec. 2000e-5(g), forbids the courts from giving relief (such as hiring, reinstatement, promotion, or back pay), if that individual was refused employment, advancement or was suspended or discharged "for any reason other than discrimination."

Obviously, in some cases the evidence of an employer's discriminatory animus may be so strong as to "effectively preclude an employer from contending that the same decision would have been made regardless of the employer's motivation." See *Blalock v. Metals Trades, Inc.*, 775 F.2d 703, 712 (6th Cir. 1985). In many instances, like the instant case, however, there may be many reasons for an employment decision. Thus,

> employment decisions are often complex, and, where dozens of factors are involved in evaluation of an employee, the fact that one such factor is impermissible does not necessarily preclude the contention that the adverse employment action would have been taken regardless of the impermissible factor.

Blalock, 775 F.2d at 712. *See also Bibbs v. Block*, 778 F.2d 1318, 1330-32 (8th Cir. 1985) (Ross, J., dissenting), in which Judge Ross discusses in detail the Title VII requirement that the plaintiff prove that the adverse action against the plaintiff was taken "because of" the discriminatory motive.

Because of this statutory language, Title VII places the burden on the plaintiff to show that some statutorily proscribed factor (such as race or sex) was a "but for" cause of the employer's conduct. *McDonald v. Santa Fe Trail Transportation Company*, 427 U.S. 273, 283 n.10 (1976). Further, the Court consistently has resisted attempts by plaintiffs to shift the burden of proof in Title VII cases to the employer and has made clear that to prevail against the plaintiff's prima facie case, the employer is not required "to prove absence of discriminatory motive." *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 24 (1978).

The Court has developed "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Construction Corporation v. Waters*, 438 U.S. 567, 577 (1978). As the Court has explained, the specific requirements "necessarily will vary" with the facts of each case. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 n.13 (1973). In addition, however, the ultimate burden of proving intentional discrimination *never* shifts from the plaintiff. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Thus, once the employer has explained its conduct, "the factual inquiry proceeds to a new level of specificity," *id.*, at 255, and the plaintiff's burden of proving pretext merges with the ultimate burden of proof. *Id.*, at 256.

II. Even Assuming That Discriminatory Motive Can Be Shown, Once The Employer Provides A Legitimate Nondiscriminatory Reason For Its Conduct, The Plaintiff Must Prove By A Preponderance Of The Evidence That The Misconduct Made A Difference In The Employer's Decision.

As shown, a Title VII plaintiff may establish a prima facie case of discrimination either by direct evidence, or by the *McDonnell Douglas* construct permitting an inference of intentional discrimination. The central focus of the inquiry is always whether "[t]he employer simply [is treating] some people less favorably than others *because of* their race, color, religion, sex, or national origin.'" *Teamsters v. United States*, 431 U.S. at 335 n.15 (emphasis added). If the employer's actions remain unexplained, the presumption arises that they are "more likely than not based on the consideration of impermissible factors." *Furnco*, 438 U.S. at 577.

But rather than adopt hard-and-fast, inflexible requirements, the court has required a realistic application of this legal formula. As explained in *Furnco*:

> . . . [W]e know from our experience that more often than not people do *not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.* Thus, when *all* legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* [emphasis in original] reason, based his decision on an impermissible consideration, such as race.

438 U.S. at 577 (emphasis added).[5]

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[5] As the Court has noted, "[Title VII] was not intended to 'diminish traditional management prerogatives.'" *Burdine,*

After the district court has tried the case and has all the evidence before it, this Court has cautioned against becoming bogged down in a mechanistic application of the *McDonnell Douglas* standards and "unnecessarily evad[ing] the ultimate question of discrimination, *vel non*." *See U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983). Once the employer introduces evidence that it acted for "a" legitimate, nondiscriminatory reason (*Aikens*, 460 U.S. at 714), " 'the factual inquiry proceeds to a new level of specificity.' " *Id.*, at 715, citing *Burdine*, 450 U.S. at 255. Aikens showed that, despite his qualifications, whites were promoted above him. In addition: "He introduced testimony that *the person responsible for the promotion decisions at issue had made numerous derogatory comments about blacks in general and Aikens in particular*." 460 U.S. at 714 n. 2 (emphasis added). Thus, even in the face of apparently direct evidence of anti-black animus, this Court stated that the initial prima facie presumption of discrimination "drops from the case", 460 U.S. at 715.

Thus, with a full record before it, the district court should look at "all the evidence". 460 U.S. at 715. As in "other civil litigation," the court should decide "disputed" questions of fact. 460 U.S. at 715-16.

> "The plaintiff retains the burden of persuasion . . . [H]e may succeed in this either directly by persuading the court that a discriminatory reason *more likely* motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."

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450 U.S. at 259 (quoting *McDonnell Douglas*, 411 U.S. at 207). *See also, United Steelworkers v. Weber*, 443 U.S. 193, 206 (1979).

460 U.S. at 716, citing *Burdine*, 450 U.S. at 256. Accordingly, it is clear that even where direct proof of discriminatory intent has been shown, when the employer introduces evidence showing a legitimate reason for its conduct, the plaintiff cannot prevail absent a showing that it was the discriminatory reason that "more likely motivated the employer."[6] The courts below thus were patently in error by placing the burden on the employer to prove, by clear and convincing evidence, that the unlawful factor was not the determinative one.

Moreover, there are important, practical reasons why a plaintiff who cannot meet this burden of proving causation should not be able to prevail merely by showing that someone in a supervisory capacity "harbored some discriminatory motivation." *McQuillen v. Wisconsin Education Association Council*, 830 F.2d 659, 664 (7th Cir. 1987). The employee also "must establish that the discriminatory motivation was a determining factor in the challenged employment decision in that the employee would have received the job absent the discriminatory motivation." *Id.*

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[6] This Court has rejected arguments that this places an impermissible burden on the plaintiff. As explained in *Burdine*, the employer's reasons must be "clear and reasonably specific." 450 U.S. at 258. In addition, "the liberal discovery rules applicable to any civil suit in federal court are supplemented in a Title VII suit by the plaintiff's access to the Equal Employment Opportunity Commission's investigatory files concerning her complaint." *Id.* at 258. Indeed, in the district court below, Judge Gesell stated: "In the course of this trial, Price Waterhouse has been very forthcoming in providing information on its partnership se[le]ction process." Pet. App. 49a.

For example, the courts have recognized that while the record in a particular case may establish that a statement was improperly race- or sex-based, it often can be shown that the person who made the statement was not involved to a sufficient degree in the decision at issue. See *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1412-13 (7th Cir. 1984); *Fisher v. Flynn*, 598 F.2d 663, 665 (1st Cir. 1979); and *Lucy v. Manville Sales Corp.*, 674 F. Supp. 1426 (D. Colo. 1987). Under these cases, the employee's failure to establish a "causal connection" between the alleged discriminatory conduct and the employer's action ultimately was sufficient to defeat the discrimination claim also. In addition, there often will be overriding reasons that a person will not be given an employment opportunity, such as lack of qualifications, lack of openings, or other reason showing the individual would not have been hired.

This case provides an apt example. Here, an accounting firm of immense size had the difficult task of identifying and choosing who will be selected for partnership. Evaluations of a large number of candidates are done by a large number of existing partners. While isolated improper statements allegedly were made, those statements should not be determinative where there are overriding, legitimate reasons for not making the individual a firm partner.

Partnership, of course, is much more than an ordinary employment relationship. Numerous subjective concerns necessarily are involved, such as professional standing, outside activities, adequacy of billings, and contributions to the success and reputation of the firm. *Cf. Hishon v. King & Spaulding*, 467 U.S. 69, 79-81, and n.3 (1984) (Powell, J., concurring). One of the most important factors is the ability to get along with other partners and members of the staff—the very concerns upon which Price Waterhouse determined not to make the plaintiff a partner.

Here, the district court held that it could not say that she would have been selected for partnership if the Policy Board's decision had not been tainted by sexually biased evaluations. Pet. App. 59a. It also held that "[t]he comments of the individual partners and the expert evidence by Dr. Fiske do not prove an intentionally discriminatory motive or purpose." Pet. App. 54a. Judge Gesell further ruled that "the complaints about the plaintiff's interpersonal skills were not fabricated as a pretext for discrimination." Pet. App. 46a. Given those holdings, it was clear that the employer had met its burden of rebutting the plaintiff's prima facie case. Since the plaintiff failed to prove that she would have been chosen "but for" the alleged discriminatory conduct, the suit should have been dismissed.[7]

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[7] The district court's reliance on so-called expert testimony of sex stereotyping is troublesome, inasmuch as Judge Gesell found that "Dr. Fiske did not purport to be able to determine whether or not any particular reaction was determined by the operation of sex stereotypes. However, she did identify comments that she *believed* were influenced by sex stereotypes." Pet. App. 53a. (Emphasis added). The determination of whether race or sex played a part in a particular employment decision would seem to be the ultimate issue for the district court, and an inappropriate issue on which to allow a purported "expert" to express a belief, particularly in view of Dr. Fiske's failure to examine any of Price Waterhouse's partners or their particular reactions to Ms. Hopkins.

Equally disturbing is the district court's apparent deference to technical research (Pet. App. 52a-53a and n.10). The dis-

III. *Mt. Healthy* And *Transportation Management* Do Not Shift The Burden To The Employer In A Title VII "Mixed Motive" Case. In Any Event Those Decisions Only Impose A Burden To Prove By A "Preponderance" Of The Evidence Rather Than By "Clear And Convincing" Evidence.

The plaintiff's opposition to the writ of certiorari erroneously states that "the district court then followed settled precedent and inquired whether Price Waterhouse had proved that Hopkins would have been rejected even in a bias-free setting. *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287 (1977); *National Labor Relations Board v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983)." Op. cert. at 3. The plaintiff is wrong for at least three reasons. First, the district court did not even mention those decisions. Second, those decisions are not applicable to Title VII cases. Third, both courts below improperly imposed a "clear and convincing" standard in this civil litigation—a burden that is clearly at odds with the "preponderance" standard previously used by this Court in the *Mt. Healthy* line of cases.

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trict court came dangerously close to taking judicial notice of research opinion which was not subject to deposition, cross examination and the other rigours of trial. Inasmuch as "societal discrimination" is not sufficient for proof under Title VII (*See generally, Wygant v. Jackson Board of Education*, 106 S.Ct. 1842, 1847-49 (1986) (Opinion of Powell, J.)), use of generalized research opinion seems even more inappropriate in a case where there has been such extensive discovery in the district court as to the specific employment decisions of a particular employer. A much more appropriate and valid analysis of the evidence *of this particular case* was undertaken by Judge Williams in his dissenting opinion below. Pet. App. 28a-39a.

Neither *Mt. Healthy* (a constitutional case) nor *Transportation Management* (a National Labor Relations Act case) involved statutory language such as found in Title VII which imposes upon the plaintiff the burden of proving that the discrimination was "because of" the employer's discrimination. Indeed, neither decision even discussed the language of Title VII upon which the Title VII statutory burden of proof scheme is based.

As previously shown, this Court's Title VII cases, for good reason, have never moved the burden of proof to the employer. Instead, under Title VII, even if the plaintiff can establish some direct evidence of discriminatory motive, once the employer articulates a legitimate nondiscriminatory reason, the initial prima facie presumption "drops from the case," 460 U.S. at 715 (quoting *Burdine*, 450 U.S. at 255, n.10) and the plaintiff retains the burden of persuasion that "a discriminatory motive *more likely* motivated the employer." *Aikens*, 460 U.S. at 716 (quoting *Burdine*, 450 U.S. at 256) (emphasis added). This statutory difference by itself is sufficient to distinguish the *Mt. Healthy* line of cases.

In addition, *Transportation Management* was grounded in large part upon the NLRB's construction of the National Labor Relations Act that the employer would have an "affirmative defense" (462 U.S. at 402-03) of proving by a preponderance of the evidence that it would have reached the same decision even if it had not been motivated by an improper motivation. This Court has never construed the employer's Title VII burden as involving an "affirmative defense". Thus *Transportation Management* is inapplicable to Title VII. Indeed, it was to correct a

similar error that this Court issued its *per curiam* decision in *Board of Trustees of Keene St. College v. Sweeney*, 439 U.S. 24 (1978) and made clear that the employer cannot be required to prove the absence of discriminatory motive.

Further, *Transportation Management* held that the Court's Title VII *Burdine* decision was "inapposite", noting both that the plaintiff in *Burdine* bore the "ultimate burden" of persuading the trier of fact that the defendant committed discrimination, and that no illegal motivation was involved in *Burdine*. As shown above, the Court's *Aikens* decision clarified that the plaintiff's Title VII burden is to prove that the discriminatory motive "more likely" motivated the employer.

What *is* relevant from *Mt. Healthy* is the Court's concern that an employee who engaged in protected constitutional conduct should not be reinstated if there were other legitimate reasons for not doing so, particularly in light of the "significant," "long-term consequences" of the tenure decision at issue in that case. 429 U.S. at 286. The Court reasoned in *Mt. Healthy* that: "[t]he constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct." 429 U.S. at 285-86. As the Court stated in language directly applicable to the plaintiff here:

> that same candidate ought not to be able, by engaging in such [protected] conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record. . . .

429 U.S. at 286.

Finally, in the event that the Court should find that its *Mt. Healthy* line of cases should be applied to Title VII, it then should reject the "clear and convincing" standard applied by the courts below. Neither court offered any statutory or decisional authority for their unusual holdings, apparently relying on mere *ipse dixit* to establish the employer's ultimate burden of proof.

This Court consistently has held that a defendant may prevail if it can show "by a *preponderance of the evidence* that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." *Mt. Healthy*, 429 U.S. at 287 (Emphasis added). The preponderance standard also was used in *Transportation Management* (462 U.S. at 402), and *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 416 (1979).

It is hornbook law that the "preponderance of the evidence" standard is the standard to be used "on the general run of issues in civil cases. . . ." *McCormick's Handbook of the Law of Evidence*, Second Ed., West Publishing Co., 1972, at p. 793. The "clear and convincing" standard is used only in "certain exceptional controversies" not applicable here. *Id.*, at 793, 796-98. And as the Court stated in *Aikens*, questions of fact in Title VII cases are to be decided "just as district courts decide disputed questions of fact in other civil litigation." 460 U.S. at 715-16.[8] Accordingly, whichever party bears the ultimate burden in this case, that burden may be met by satisfying the "preponderance of the evidence" standard.

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[8] Accord, *Marek v. Chesney*, 473 U.S. 1, 10 (1985) (No evidence "that civil rights claims were to be on any different footing from other civil claims. . .").

CONCLUSION

For the reasons stated, the decision below should be reversed.

Respectfully submitted,

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